MICHIGAN SUPREME COURT

Office of Public Information

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CHILD PORNOGRAPHY CHARGES CHALLENGED IN CASES BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS THIS WEEK

Having pornographic images of children in computers' temporary Internet files not "knowing possession," defendants argue; another case presents issue whether downloading, saving child sexually abusive materials to CD is "making or producing" child pornography

Supreme Court also to consider whether plaintiff in no-fault auto case suffered "serious impairment of body function"

LANSING, MI, January 11, 2010 – Three cases involving child pornography charges – and the question of whether the defendants' actions fall under statutory definitions of child pornography offenses – are among the cases that the Michigan Supreme Court will hear in oral arguments this week.

In *People v Flick* and *People v Lazarus*, the defendants were charged under MCL 750.145c(4) – knowing possession of child sexually abusive material – after investigators found child pornography images stored in temporary Internet files on the defendants' computers. Both defendants sought to have the charges dropped; each argued that there was no evidence that he knew that the pornographic images had been transferred to the temporary Internet files, and that he did not "knowingly" possess the images, as required by the statute. But the Michigan Court of Appeals held that the prosecution had probable cause for the charges because the defendants possessed the computers on which the contraband images were found. The evidence was sufficient to establish a reasonable inference that the defendants knowingly possessed child pornography, the Court of Appeals said.

In *People v Hill*, the defendant was charged and convicted of "arranging for, producing, making, or financing" child sexually abusive material under MCL 750.145(c)(2), a felony punishable by up to 20 years in prison. Thousands of child pornography images were found on laptops and CD-Rs in the defendant's home. In seeking to overturn his convictions, the defendant argues in part that he should have been charged with the lesser offense of knowing possession of child pornography under MCL 750.145(c)(4). MCL 750.145c(2) should not apply to those who download pornographic images to CD-Rs for their personal use, the defendant contends.

An auto no-fault case, *McCormick v Carrier*, is also before the Court. In *McCormick*, the plaintiff seeks non-economic damages for injuries he suffered when a co-worker backed a truck over his ankle. At issue is whether the plaintiff suffered a "serious impairment of body function" as provided by the no-fault act. The Michigan Supreme Court held in *Kreiner v Fischer*, 471 Mich 109 (2004), that, if the "course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he

does not meet the 'serious impairment of body function' threshold." In this case, the plaintiff's claims for non-economic damages were dismissed by the trial court based on *Kreiner*, and the Court of Appeals affirmed in a 2-1 decision. While the plaintiff's injury was serious, he continued to have the same activities, and worked at the same rate of pay, as he had before the accident, the appellate majority said. The dissenting judge said that the case should have been allowed to go to a jury, in part because there was evidence that the plaintiff's post-injury life was not normal.

The remaining nine cases that the Court will hear involve child protection, civil procedure, civil rights, criminal, defamation, inheritance, and medical malpractice issues.

Court will be held on **January 12 and 13** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, January 12
Morning Session

MCCORMICK v CARRIER, et al. (case no. 136738)
Attorney for plaintiff Rodney McCormick: Mark R. Bendure/(313) 961-1525
Attorney for defendant Allied Automotive Group, Inc., Indemnitor of General Motors Corporation: Michael P. McDonald/(616) 956-5559
Attorney for amicus curiae Coalition Protecting Auto No-Fault (CPAN): George T. Sinas/(517) 394-7500
Attorney for amicus curiae Insurance Institute of Michigan: Daniel S. Saylor/(313) 446-5520
Attorney for amicus curiae John A. Braden: John A. Braden/(231) 924-6544
Attorney for amicus curiae Michigan Association for Justice: Liisa R. Speaker/(517) 482-8933
Attorney for amicus curiae Negligence Section of the State Bar of Michigan: José T. Brown/(810) 232-3141
Attorney for amicus curiae Commissioner of the Office of Financial and Insurance Regulation: Christopher L. Kerr/(517) 373-1160
Attorney for amicus curiae Attorney General Michael A. Cox: Ann M. Sherman/(517) 373-6434
Trial Court: Genesee County Circuit Court
At issue: The plaintiff was injured at work when a co-worker backed a truck over his left ankle. Under MCL 500.3135(1), a person may maintain a lawsuit for non-economic damages arising from the ownership, use or maintenance of a motor vehicle by showing that he suffered a "serious impairment of body function . . . ." If a court finds an objectively manifested

impairment of an important body function, it must then determine whether the impairment affects the plaintiff's general ability to lead his or her normal life. MCL 500.3135(7). In *Kreiner v Fischer*, 471 Mich 109 (2004), the Supreme Court held that, if the "course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold." In this case, the plaintiff sought to establish that he suffered a serious impairment of body function, but the trial court granted the defendant's motion for summary disposition, based on *Kreiner*. The Court of Appeals affirmed in a 2-1 decision. Did the plaintiff suffer a "serious impairment of body function"? Should the Michigan Supreme Court reconsider its ruling in *Kreiner*?

Background: While working at a General Motors plant in Flint, Rodney McCormick was injured when a co-worker, Larry Carrier, backed a truck over McCormick's left ankle. McCormick underwent two surgeries to repair his ankle and attended weeks of physical therapy. He was restricted from all work for one year; his treating physician then cleared McCormick to return to work without restrictions. But when McCormick returned to work, he experienced difficulty walking, climbing, and crouching, which his job required, so he went back on workers' disability compensation. About 18 months after the accident, McCormick again returned to work. Although he was not under any physical restrictions, he was assigned to another job with different physical requirements. McCormick sued General Motors and Carrier, seeking third-party no-fault benefits to compensate for his non-economic damages. Under the state's no-fault insurance statute, a person may sue for non-economic damages arising from the ownership, use or maintenance of a motor vehicle by showing that he suffered a "serious impairment of body function . . . ." MCL 500.3135(1). If a court finds an objectively manifested impairment of an important body function, it must then determine whether the impairment affects the plaintiff's general ability to lead his or her normal life. MCL 500.3135(7). General Motors moved to dismiss McCormick's lawsuit, arguing that McCormick did not suffer a "serious impairment of body function" as defined by MCL 500.3135(1). The trial court granted the motion, agreeing that McCormick could not satisfy the standard that the Michigan Supreme Court set in *Kreiner v Fischer*, 471 Mich 109 (2004). In *Kreiner*, the Supreme Court held that if the "course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold." McCormick appealed, but the Court of Appeals affirmed in a split unpublished opinion. The majority agreed that McCormick's injury was serious and objectively manifested, as required by the statute. But, the judges noted, McCormick continued to fish, golf, drive his truck, and care for himself without any help, much as he had before the accident, and worked at the same rate of pay. He did not seek further medical treatment after his doctor sent him back to work and admitted during his deposition that, except for some ankle pain, his life was relatively normal, the majority said. The dissenting judge said that the case should have been allowed to go to a jury. There was evidence that McCormick faced "at least the possibility of future problems," the judge stated. Moreover, "there is also evidence in the record that plaintiff's life is not, in fact, normal, and that this has been objectively and independently determined by two doctors and plaintiff's employer," the dissenting judge said. McCormick appealed to the Supreme Court, which initially denied leave to appeal but then granted reconsideration, vacated its prior order, and granted leave to appeal. By stipulation of the parties, Allied Automotive Group, Inc. has been substituted for General Motors, which has been dismissed.

TKACHIK v MANDEVILLE (case no. 138460)
Attorney for plaintiff Susan Tkachik, Personal Representative of the Estate of Janet Elaine Mandeville: Charles M. Penzien/(586) 464-1900
Attorney for defendant Frank Mandeville, Jr.: William K. Cashen/(586) 532-4100
Attorney for amicus curiae Family Law Section of the State Bar of Michigan: Judith A. Curtis/(313) 882-8116
Trial Court: Macomb County Probate Court
At issue: A husband was often absent in the years preceding his wife's death. He did not see her in the 18 months before her death, nor did he attend her funeral. The wife's will disinherited her husband and left everything to her sister, who obtained a probate court ruling that the husband was not a "surviving spouse" pursuant to MCL 700.2801(2)(e)(i). The sister, on behalf of the estate, then argued that the husband could not succeed to ownership of the property that he and the wife had owned during their marriage as tenants by the entireties. In the alternative, the sister argued that the husband must reimburse the estate for his share of the mortgage, tax, and insurance payments that his wife made on the property while he was absent. The trial court and Court of Appeals ruled that the husband succeeded to ownership of the property, and that the wife's estate could not claim contribution from him. Must the husband reimburse the estate for his share of the payments that his wife made?
Background: Janet and Frank Mandeville, Jr., a married couple, bought real property in Macomb and Ogemaw counties. Under Michigan law, when spouses acquire property together, they are deemed to hold the property as "tenants by the entireties," meaning that each spouse is considered to own the whole property; when one spouse dies, the surviving spouse automatically owns the entire property. In the years leading up to Janet Mandeville's death from cancer, Frank Mandeville was often absent; he did not see her during the 18 months before her death and did not attend her funeral. However, neither of them filed for divorce, and Janet Mandeville did not pursue a claim of spousal abandonment, contribution, or unjust enrichment against Frank. Several weeks before her death, Janet executed a will and trust, both of which provided: "It is my specific intent to give nothing to my husband . . . . If I am survived by my husband, for purposes of this Will, he will be deemed to have predeceased me." Janet left her estate to her sister, Susan Tkachik, who cared for Janet during her illness; the will also appointed Tkachik the personal representative of the estate. Tkachik obtained a probate court order providing that Frank was "not a surviving spouse" pursuant to MCL 700.2801 because he had been willfully absent from the marriage for over a year. Tkachik then sought a determination that, because Frank was not a surviving spouse, he should not obtain ownership of the property that he and Janet held as tenants by the entireties. But the probate court ruled that, upon Janet's death, ownership of the entire property vested in Frank. Tkachik then amended her complaint to claim contribution from Frank for the expenses that Janet paid to maintain the property, but the court dismissed that claim. The Court of Appeals affirmed the probate court in a published opinion, finding that a contribution claim was not appropriate in this case. Frank had not been unjustly enriched, the appellate court reasoned; the Court of Appeals also stated that it did not wish to interfere with the way in which spouses chose to conduct their marriage or hold property. Tkachik appeals.

O'NEAL v ST. JOHN HOSPITAL & MEDICAL CENTER, et al. (case no. 138180-1)
Attorney for plaintiff Raymond O'Neal: Ramona C. Howard/(313) 961-4400
Attorney for defendants St. John Hospital & Medical Center and Ralph DiLisio, M.D.: Christina A. Ginter/(313) 965-7841

Attorney for defendant Efstathios Tapazoglou, M.D.: Paul J. Manion/(313) 965-6100
Attorney for amicus curiae Michigan Association for Justice: Richard D. Toth/(248) 355-0300
Attorney for amicus curiae Michigan Defense Trial Counsel: David M. Ottenwess/(313) 965-2121
Attorney for amicus curiae Michigan Health & Hospital Association: John J. Bursch/(616) 752-2000
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Trial Court: Wayne County Circuit Court
At issue: The plaintiff alleged that the defendant physicians mismanaged his medical care, causing him to suffer a stroke. The plaintiff's expert acknowledged that the likelihood of the plaintiff suffering a stroke without treatment was small (10 to 20 percent), but testified that if the plaintiff had received proper treatment, the risk would have been reduced by 50 percent or more, so that the risk of stroke would have been 5 to 10 percent or less. The defendants moved for summary disposition on the issue of proximate cause. The trial court denied the defendants' motion, but the Court of Appeals reversed. Is this a "lost opportunity" case, such that the requirements in the second sentence of MCL 600.2912a(2) apply? If so, how should that sentence be interpreted? If not, did the plaintiff present sufficient evidence to create a genuine issue of fact with regard to proximate cause?
Background: Raymond O'Neal sued physicians Ralph DiLisio and Efstathios Tapazoglou, alleging that they mismanaged his sickle-cell anemia and that, as a result, he suffered a stroke. O'Neal's experts testified that the stroke would likely not have occurred if the defendants had treated O'Neal more aggressively during a hospitalization. One of O'Neal's experts, Dr. Griffin Rodgers, acknowledged that the likelihood of O'Neal suffering a stroke without treatment was small, 10 to 20 percent. But if O'Neal had received proper treatment, that risk would have been reduced by 50 percent or more, so that the risk would have been reduced to 5 to 10 percent or less, Rodgers said. Another expert testified that studies showed that the proper treatment can reduce the risk of stroke by up to 90 percent, but acknowledged that he did not know what the initial risk of stroke was, speculating that it might only be 5 percent. The defendants moved to dismiss O'Neal's case. They argued that his experts' testimony did not meet the standards for admissibility under *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Moreover, O'Neal had failed to show that the defendants' actions proximately caused his injuries, the defendants contended. After the trial court denied the defendants' motion, the defendants appealed. In an unpublished opinion, the Court of Appeals reversed the circuit court and remanded for entry of an order granting the defendants' motion for summary disposition. The majority held that this is a "lost opportunity" case to which MCL 600.2912a and *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002), apply. Section 2912a states in part that "[i]n an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." In *Fulton*, the Court of Appeals held that this provision required a plaintiff to establish that the initial opportunity was reduced by more than 50 percentage points. Applying *Fulton* and MCL 600.2912a(2) to O'Neal's case, the Court of Appeals majority concluded that O'Neal had failed to show that the defendants' conduct was more than 50 percent the cause of his loss of an opportunity to achieve a better result. One judge concurred, explaining that she

would have also held that the defendants were entitled to summary disposition based on a lack of proximate causation regardless of whether this is a "lost opportunity" case. O'Neal appeals.

Afternoon Session

EDRY v ADELMAN, et al. (case no. 138187)
Attorney for plaintiff Tracy Edry: Richard D. Toth/(248) 355-0300
Attorney for defendants Marc Adelman and Marc Adelman, D.O., P.C.: Debbie K. Taylor/(586) 447-3700
Attorney for amicus curiae Michigan Association for Justice: Barbara H. Goldman/(248) 569-9011
Attorney for amicus curiae Michigan Health & Hospital Association: John J. Bursch/(616) 752-2000
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Trial Court: Oakland County Circuit Court
At issue: The plaintiff claims that her physician failed to timely diagnose her breast cancer, reducing her opportunity to survive and subjecting her to more invasive medical treatment. The trial court granted the defendants' motion to strike the testimony of the plaintiff's expert oncologist, determining that the expert's testimony was not admissible under Michigan Rule of Evidence 702. The trial court then granted the defendants' motion to dismiss the complaint. The Court of Appeals affirmed, agreeing that the expert's testimony was inadmissible, but also noting that, under *Wickens v Oakwood Healthcare System*, 465 Mich 53 (2001), a living plaintiff may not recover for the loss of an opportunity to survive based on a decrease in her life expectancy. Did the lower courts err in finding that the expert's testimony was inadmissible under MRE 702? Was *Wickens* correctly decided?
Background: Tracy Edry sued Marc Adelman, D.O., and his professional corporation, alleging that Adelman committed medical malpractice when he failed to diagnose her breast cancer in June 2003. Edry was not diagnosed until February 2005, when it was confirmed that she had invasive breast cancer that had spread to 16 of her lymph nodes. She underwent a radical mastectomy, chemotherapy, and radiation therapy. In her lawsuit, Edry claimed that the delay in treatment resulted in a decreased opportunity to survive and subjected her to more invasive medical treatment. Edry's expert witness, oncologist Dr. Barry Singer, testified that that Edry's chances of recovery went from 95 percent to less than 20 percent as a result of Adelman's alleged malpractice. The defendants moved to strike Singer's testimony, arguing that it did not meet the requirements of Michigan Rule of Evidence 702, "Testimony By Experts," and MCL 600.2955. Following a hearing, the trial court determined that Singer's testimony was not sufficiently supported in the scientific community to be reliable under MRE 702, so he could not testify at trial. On the defendants' motion, the trial court dismissed Edry's lawsuit because, without Singer's testimony, Edry could not support her malpractice claim. Edry appealed, but the Court of Appeals affirmed the trial court's rulings in an unpublished per curiam opinion. The panel agreed with the trial court that Singer's testimony was inadmissible. The appellate court also noted that, under *Wickens v Oakwood Healthcare System*, 465 Mich 53 (2001), a living plaintiff may not recover for the loss of an opportunity to survive based on a decrease in her life expectancy. Edry appeals.

BRIGHTWELL and CHAMPION v FIFTH THIRD BANK OF MICHIGAN (case nos. 138920-1)
Attorney for plaintiffs Brandon Brightwell and Sharon Champion: Thomas E. Marshall/(248) 828-4440
Attorney for defendant Fifth Third Bank of Michigan: Daniel B. Tukel/(313) 225-7000
Attorney for amicus curiae Michigan Association for Justice: Eugenie B. Eardley/(616) 874-2647
Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: Matthew T. Nelson/(616) 752-2000
Trial Court: Wayne County Circuit Court
At issue: The plaintiffs each sued their former employer, Fifth Third Bank, in Wayne County, alleging that the bank's termination of their employment violated Michigan's Civil Rights Act. The bank filed motions to transfer both cases to Oakland County, arguing that it made the decisions to end the plaintiffs' employment at its Oakland County corporate headquarters. The circuit court denied the motions, but the Court of Appeals reversed in a split opinion. Did the Court of Appeals majority correctly determine that the alleged violations "occurred" only in Oakland County, where the decisions to terminate the plaintiffs were made, rather than in Wayne County, where the plaintiffs worked and where the plaintiffs learned of the bank's decision?
Background: Brandon Brightwell and Sharon Champion worked for Fifth Third Bank of Michigan in Wayne County. Fifth Third terminated both plaintiffs' employment, telling the plaintiffs of this decision while they were in Wayne County. Brightwell and Champion each sued Fifth Third in Wayne County, claiming that Fifth Third had terminated their employment based on race, in violation of Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*. Fifth Third filed motions to transfer both cases to Oakland County, pursuant to MCL 37.2801(2). MCL 37.2801(2) provides that venue – the legally proper place for a case to be filed or handled – is appropriate in the county "where the alleged violation occurred or in the county where the defendant resides or has his principal place of business." Fifth Third filed an affidavit in each case, asserting that the decisions to terminate Brightwell and Champion were made in Fifth Third's Oakland County regional headquarters in Southfield. The termination decisions were the "alleged violation" for purposes of the statute, so venue was proper in Oakland County, Fifth Third contended. But the plaintiffs argued that the alleged violations occurred when Fifth Third implemented its decisions to terminate their employment by telling the plaintiffs that they no longer had a job with Fifth Third. In each case, that communication occurred in Wayne County, so, the plaintiffs argued, venue in Wayne County was proper. The trial court denied Fifth Third's motions to change venue. Fifth Third appealed to the Court of Appeals in both cases, which were consolidated. In a split unpublished per curiam opinion, the Court of Appeals reversed the trial court. The majority agreed with Fifth Third that the alleged Civil Rights Act violations occurred where the decisions to terminate Brightwell and Champion's employment were made. The dissent agreed with the plaintiffs that the alleged Civil Rights Act violations occurred only when Fifth Third implemented the decisions to discharge the plaintiffs. Brightwell and Champion appeal.

PEOPLE v BARBARICH (case no. 139060)
Prosecuting attorney: Jeffrey Caminsky/(313) 224-5846
Attorney for defendant Shaun David Barbarich: Gregory J. Boulahanis/(313) 277-2550
Trial Court: Wayne County Circuit Court

At issue: A motorist indicated to a passing State Police trooper that the defendant had nearly hit her. The trooper arrested the defendant; a breathalyzer showed that the defendant had a blood alcohol level more than twice the legal limit. The defendant was charged with operating a vehicle while intoxicated. But the defendant moved to dismiss the breathalyzer results, arguing that the trooper lacked probable cause to stop him because the only evidence that he was driving erratically came from an anonymous witness. The district court denied the defendant's motion to suppress, but on appeal, the circuit court reversed, and dismissed the charges. Did the trooper have the authority to stop the defendant's car?

Background: Michigan State Trooper Christopher Bommarito testified that, on St. Patrick's Day in 2008, he passed a pick-up truck going north, followed by a second pick-up truck. According to Bommarito, the female driver of the second pick-up truck pointed at the first and mouthed the words, "Almost hit me." Bommarito made a U-turn, activated the emergency lights and siren, followed the first pick-up truck into a parking lot, and stopped it, ordering the driver, Shaun Barbarich, to get out of his truck. Bommarito said he noticed that Barbarich smelled like he had been drinking; his eyes were bloodshot and his speech was slurred. A breathalyzer test showed blood alcohol levels of 0.20 and 0.18. Bommarito arrested Barbarich and charged him with the misdemeanor offense of operating under the influence. Barbarich moved to suppress the breathalyzer evidence, arguing that the trooper did not have probable cause to stop and search because the only evidence of a driving irregularity was from an anonymous driver. The district court held an evidentiary hearing at which Bommarito was the only witness. The officer testified that the sole reason that he stopped Barbarich was the statement of the woman in the pick-up truck. The district court denied the motion to suppress, but the circuit court reversed the district court on appeal and dismissed the charge against Barbarich with prejudice. The Court of Appeals denied the prosecutor's application for leave to appeal; the prosecutor appeals to the Supreme Court. Among the issues are whether the trooper had sufficient, reliable information, based on the anonymous other driver's tip, to form a particularized suspicion that Barbarich had been or was about to be engaged in criminal wrongdoing. Also at issue is whether the other driver's tip constitutes a complaint for purposes of the Michigan Vehicle Code. Under MCL 257.742(3), "A police officer may issue a citation to a person who is a driver of a motor vehicle when, based upon personal investigation by the police officer of a complaint by someone who witnessed the person violating this act or a local ordinance substantially corresponding to this act, which violation is a civil infraction, the officer has reasonable cause to believe that the person is responsible for a civil infraction and if the prosecuting attorney or attorney for the political subdivision approves in writing the issuance of the citation." Barbarich argues that there were no objective facts to make the stop lawful under the Vehicle Code.

Wednesday, January 13
Morning Session

PEOPLE v FLICK (case no. 138258)
PEOPLE v LAZARUS (case no. 138261)
Prosecuting attorney: Jerrold Schrotenboer/(517) 788-4283
Attorney for defendant Steven Edward Flick: Robert J. Gaecke, Jr./(517) 787-5811
Attorney for defendant Douglas Brent Lazarus: Michael B. Dungan/(517) 783-3500
Attorneys for amicus curiae Criminal Defense Attorneys of Michigan: Douglas R. Mullkoff/(734) 761-8585, F. Mark Hugger/(734) 975-9150

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-4801
Trial Court: Jackson County Circuit Court
At issue: The defendants in these cases are alleged to have viewed child sexually abusive material on the Internet. When the defendants' computers were examined, there were images of child pornography stored in temporary Internet files. Each defendant argued that there was no evidence that he knew that the pornographic images had been transferred to the temporary Internet files, and that he did not "knowingly" possess the images, as required by MCL 750.145c(4). The Court of Appeals ruled that the defendants were properly charged under MCL 750.145c(4). Does intentionally accessing and viewing child sexually abusive material on the Internet constitute "knowing possession" of such material under MCL 750.145c(4)? May the presence of temporary Internet files on a computer hard drive amount to "knowing possession" of child sexually abusive material or be circumstantial evidence that a defendant "knowingly possessed" such material in the past?
Background: Following an investigation into Internet pornography, agents of the Department of Homeland Security, Bureau of Immigration and Customs Enforcement concluded that Steven Flick and Douglas Lazarus each subscribed to at least one web site offering child pornography. Computer forensics experts searched Flick's and Lazarus' computers and found child pornographic images stored in the computers' temporary Internet files. Both Flick and Lazarus were charged with knowing possession of child sexually abusive material, contrary to MCL 750.145c(4). Lazarus argued that the charges brought against him should be dismissed because the mere presence of child sexually abusive images in his computer's temporary Internet files did not establish "knowing possession" of child sexually abusive material. The district court denied Lazarus' motion to quash the information, and the case was bound over to circuit court, where Lazarus renewed his argument. The circuit court agreed with Lazarus that he did not "possess" the child pornography, and it granted his motion to quash the information. The prosecutor then appealed to the Court of Appeals. The Court of Appeals consolidated the prosecutor's appeal in the Lazarus case with Flick's appeal. Flick had also argued that the charges against him should be dismissed because he did not "possess" child pornography. In his case, both the district court and the circuit court denied his motion, and he appealed to the Court of Appeals. Considering the cases together, the Court of Appeals held that, in both cases, the prosecutor established probable cause to believe that the defendants knowingly possessed child sexually abusive material, within the meaning of MCL 750.145c(4). The defendants possessed child sexually abusive material, the appellate court held, because they possessed the computers on which the contraband images were found. The evidence was sufficient to establish a reasonable inference that the defendants did so knowingly, the Court of Appeals found. "The contraband images in defendants' seized computers did not find their way to defendants' temporary Internet files by happenstance, but because of deliberate acts by defendants to purchase subscriptions to websites offering child sexually abusive material," the appellate panel stated. The Court of Appeals concluded that the circuit court erred in granting Lazarus's motion to quash the information, and that the circuit court correctly denied Flick's motion to quash. The defendants appeal.

PEOPLE v HILL (case no. 138668)
Prosecuting attorney: Charles F. Justian/(231) 724-6435
Attorney for defendant Brian Lee Hill: Frank E. Stanley/(616) 459-8600
Trial Court: Muskegon County Circuit Court

At issue: The defendant downloaded child pornography from web sites to CDs and was charged and convicted of "arranging for, producing, making, or financing" child sexually abusive material under MCL 750.145(c)(2). The Court of Appeals affirmed his convictions. Does a person who downloads child sexually abusive material from the Internet, or who burns a CD-R of such downloaded material, fall within the scope of MCL 750.145c(2), which criminalizes "mak[ing]" or "produc[ing]" child sexually abusive material? How does the Court of Appeals interpretation of MCL 750.145c(2) interact with the prohibition in MCL 750.145c(4) on the "possession" of child sexually abusive materials? Does the Court of Appeals interpretation of MCL 750.145c(2) have legal consequences for other criminal offenses that involve downloading material from the Internet? Did the trial court correctly find that the defendant committed three or more contemporaneous felonious acts for purposes of scoring Offense Variable 12?
Background: Brian Lee Hill had in his home two laptops and several CD-Rs that contained over 100,000 images, 70 to 80 percent of which were child pornographic images. Based on this and other evidence, Hill was convicted of five counts of arranging for, producing, making, or financing child sexually abusive material, MCL 750.145c(2), three counts of installing a device for observing, photographing, or eavesdropping in a private place, MCL 750.539d, and five counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(f). MCL 750.145c(2) states that: "A person who . . . arranges for, produces, makes, or finances . . . any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child." On appeal, Hill argued, among other things, that MCL 750.145c(2) does not penalize people who download pornographic images for their personal use. Hill argued that he should have been charged under MCL 750.145(c)(4) for knowingly possessing child sexually abusive material. Hill also raised a sentencing challenge, arguing that one sentencing variable (Offense Variable 12, Number of Contemporaneous Felonious Acts) was improperly scored. The trial court assessed 25 points for OV 12, finding that Hill committed three or more contemporaneous criminal acts. Hill argued that there was no evidence to support this, because there was no evidence as to the number of downloads of pornographic images that occurred within 24 hours of the sentencing offense. The Court of Appeals affirmed his convictions in an unpublished per curiam opinion. The appeals court did grant Hill partial sentencing relief, but did not agree with him that there was inadequate evidence, for purposes of scoring OV 12, that he committed three or more contemporaneous felonious criminal acts. Hill appeals.

SHAY v ALDRICH, et al. (case no. 138908)
Attorney for plaintiff Thomas John Shay: Mark R. Bendure/(313) 961-1525
Attorney for defendants John Aldrich, William Plemons, and J. Miller: Ernest R. Bazzana/(313) 983-4798
Attorney for amicus curiae Michigan Association for Justice: Barbara H. Goldman/(248) 569-9011
Trial Court: Wayne County Circuit Court
At issue: The plaintiff sued police officers from Melvindale and Allen Park for assault and battery. The plaintiff and the Allen Park officers accepted a case evaluation regarding those

officers' liability, but the plaintiff rejected the evaluation with respect to the Melvindale officers. The plaintiff's settlement agreement with the Allen Park officers released "all other persons" from any liability arising out of the assault. The Melvindale officers then moved to dismiss the case against them, arguing that the settlement agreement released them from liability. The trial court denied the motion, but the Court of Appeals reversed, concluding that the release absolved all defendants of liability pursuant to *Romska v Opper*, 234 Mich App 512 (1999). Was *Romska* correctly decided?

Background: Thomas Shay sued police officers from Melvindale and Allen Park, claiming gross negligence, as well as assault and battery. The case evaluation against the Allen Park officers was $12,500 each. With respect to the Melvindale officers, the evaluation was $450,000 against one officer and $500,000 each against the other two. Shay and the Allen Park officers accepted the evaluation regarding those officers' liability, but Shay and the remaining defendants rejected the evaluation regarding all of the Melvindale officers. Counsel for the Allen Park officers requested that the now-settled case against them be disposed of by release and settlement, rather than by judgment. Shay's counsel agreed, and Shay executed two releases that released the named individual officers, their insurance carrier and "all other persons . . . from any and all claims . . . resulting from the incident …." Shay also agreed to release his claims to the extent that they could form the basis for an action for indemnity or contribution against "the parties herein released." Shay further agreed to indemnify and hold harmless the "above named released and discharged parties" and their "heirs, agents, employers, employees and any other related entities." Shay then signed a stipulation dismissing the Allen Park officers. The Melvindale officers then moved for summary disposition under MCR 2.116(C)(7), claiming that the releases' reference to "all other persons" released the remaining defendants. Shay responded that, under rule (C)(7), a dismissal based on a release is proper only if the release was executed before the lawsuit was started. The trial court denied the motion, agreeing with Shay. The court also ruled that the Melvindale defendants failed to include the defense of "release" in their first responsive pleading. The Melvindale defendants then sought to amend their affirmative defenses, to add the defense of release, but the trial court denied their motion. In doing so, the trial court considered and rejected the defendants' claim that the language of the releases was sufficiently broad to bar Shay's action against them. The court found the releases to be ambiguous, and resolved the ambiguity against the Melvindale defendants based on evidence (including the affidavit of the attorney for the Allen Park officers) that the parties did not intend to release the Melvindale defendants. The Melvindale defendants appealed to the Court of Appeals, which granted leave to appeal and, in an unpublished per curiam opinion, reversed the trial court's ruling. The Court of Appeals concluded that the language of the releases was unambiguous, and operated to bar Shay's claims against the Melvindale defendants. The court relied on *Romska v Opper*, 234 Mich App 512 (1999), where the Court of Appeals held that an agreement to release "all other parties" operated to release claims against both the settling defendant and a non-settling defendant. Shay appeals.

DADD v MOUNT HOPE CHURCH, et al. (case no. 139223)
Attorney for plaintiff Judith D. Dadd: Mary Chartier-Mittendorf/(517) 482-2000
Attorney for defendants Mount Hope Church and International Outreach Ministries, and David R. Williams: Randolph Louis Bodwin/(517) 332-5323
Trial Court: Eaton County Circuit Court

At issue: After the plaintiff sued her church and its pastor for negligence, the pastor accused her of fraud and malingering. The plaintiff sought damages for the pastor's statements, adding claims of slander, libel, and false light to her lawsuit. The defendants argued that the pastor's statements were protected by a qualified privilege because they were communications among church members. Accordingly, the plaintiff had to show that the pastor acted with actual malice when he made the statements, the defendants contended. The trial court did not instruct the jury on the defendants' qualified privilege theory, and the jury returned a verdict for the plaintiff. The Court of Appeals vacated the jury's verdict on the slander, libel, and false light claims, and remanded the case for a new trial. The appellate court held that the trial court erred in failing to instruct the jury that a qualified privilege applied to the pastor's statements. Does the duty or interest giving rise to the qualified privilege apply to all church members, or only to members who are decision-makers engaged in the conduct of church business? When does the qualified privilege cease to apply with regard to persons who are no longer church members? If an instruction on qualified privilege was required, was the failure to give the instruction harmless?
Background: Judith Dadd, a member of Mount Hope Church and International Outreach Ministries, fell backwards and hit her head during a church service. She sued Mount Hope and its pastor, David Williams, for negligence. Williams accused Dadd of insurance fraud and malingering, both orally to the congregation and in a letter to a prayer group. At least one person who received this letter was no longer a member of the prayer group and no longer attended the church. In response to Williams' statements, Dadd amended her original complaint to include, among other things, claims for slander, libel, and false light. The defendants argued that the statements were subject to a qualified privilege because they were communications between church members, and that Dadd had to establish that Williams acted with actual malice in order to recover. A qualified privilege shields the individual making the statement from liability for libel, slander, or defamation where the party making the statement has an interest in or duty to a person having a corresponding interest or duty. The trial court denied the defendants' request that the jury be instructed on qualified privilege. But the jury verdict form asked whether Williams knew the statements were false when he made them or acted with reckless disregard for whether the statements were false, and the jury answered "Yes" to this question for the counts of libel, slander, and false light. At the end of an eight-day trial, the jury returned a verdict for Dadd. The defendants appealed and, in an unpublished opinion, the Court of Appeals held that the trial court erred in failing to hold that Williams' statements were subject to a qualified privilege and in failing to instruct the jury accordingly. The panel explained that "[i]t has long been held understood that common membership in [a] church alone is a basis to apply qualified privilege." The Court of Appeals remanded the case to the trial court for a new trial on the plaintiff's slander, libel, and false light claims. The defendants appeal.

Afternoon Session

PEOPLE v JACKSON (case no. 138988)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Leonard Leppel Jackson: Kim M. McGinnis/(313) 256-9833
Trial Court: Wayne County Circuit Court
At issue: The defendant was convicted of armed robbery (for which he was sentenced to a prison term of 108 to 240 months) and two counts of felonious assault (for which he was sentenced to a prison term of 48 to 96 months). The Court of Appeals affirmed the armed robbery conviction,

but vacated the two felonious assault convictions. Although the Court of Appeals acknowledged that this changed the defendant's sentencing guidelines range for the armed robbery conviction from 108-270 months to 51-127 months, it determined that the defendant was not entitled to resentencing. Is the defendant is entitled to resentencing where his minimum sentence is within the corrected guidelines sentence range?

Background: A witness claimed that Leonard Leppel Jackson robbed her at gunpoint outside a Detroit party store. Jackson was arrested and charged as a third habitual offender with armed robbery, two counts of felonious assault, felon in possession of a firearm, and felony-firearm. Following a one-day bench trial, Jackson was convicted of armed robbery and two counts of felonious assault; he was acquitted of the weapons offenses. Jackson's minimum sentencing guidelines were calculated to be 108 to 270 months. The trial court imposed a minimum sentence of 108 months for the armed robbery conviction, and a maximum sentence of 240 months. Jackson was sentenced to prison terms of 48 to 96 months for the assault convictions, to run concurrently with his armed robbery prison term. The Court of Appeals affirmed Jackson's conviction and sentence for armed robbery, but it vacated his two convictions and sentences for felonious assault, concluding that the prosecutor failed to prove that Jackson possessed a dangerous weapon. The Court of Appeals acknowledged that Jackson's minimum sentencing guidelines fell to 51 to 127 months as a result of its ruling vacating the assault convictions. But the appeals court concluded that Jackson was not entitled to resentencing: "Because defendant's armed robbery sentence [with a minimum term of 108 months] is within the appropriate guidelines range [of 51 to 127 months] and defendant did not raise this issue 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand,' we must affirm defendant's sentence under MCL 769.34(10). *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004)." Jackson appeals.

RAAB v RIVER RIDGE-SALINE, LLC (case no. 139255)

Attorney for plaintiffs Steven Raab and Amber Raab: Donnelly W. Hadden/(734) 477-7744

Attorney for defendant River Ridge-Saline, LLC: I. Matthew Miller/(248) 851-8000

Trial Court: Washtenaw County Circuit Court

At issue: The plaintiffs sued the defendant, which filed a motion for summary disposition. The circuit court denied the motion. But it also ruled sua sponte that, based on the evidence that the plaintiffs presented in their response to the motion, the plaintiffs' claim, as a matter of law, did not allege an amount in controversy in excess of the circuit court's $25,000 jurisdictional threshold. The circuit court then remanded the case to the district court. Did the circuit court violate Michigan Supreme Court Administrative Order 1998-1 by remanding the case based on its review of documents the plaintiffs submitted with their motion response?

Background: Steven Raab and Amber Raab purchased a double-wide mobile home and rented a lot for the mobile home from River Ridge-Saline, LLC. They began to experience drainage problems and eventually sued River Ridge, asserting claims of negligence, nuisance, and violation of MCL 600.2918(2)(g) (for unlawful interference with the Raabs' possessory interest in their mobile home). River Ridge filed a motion to dismiss the case, which the circuit court denied, finding disputed issues of fact. But the circuit court also ruled on its own motion that, based on the evidence that the Raabs had presented in their response to River Ridge's motion, the Raabs' claim, as a matter of law, did not present damages in excess of $25,000. Michigan circuit courts' jurisdiction includes civil claims where the amount in controversy is $25,000 or more, whereas state district courts have jurisdiction over civil cases where less than $25,000 is at

stake. The circuit court therefore remanded the case to the district court. The Court of Appeals affirmed the circuit court in a split unpublished decision, with the majority concluding that "there is no evidence supporting damages in excess of $25,000 in relation to any of the Raabs' claims." The dissenting judge said that the circuit court improperly based its ruling on the evidence presented in the Raabs' response to River Ridge's motion. The dissenting judge cited Michigan Supreme Court Administrative Order 1998-1, which states that "[a] circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy, unless: (1) The parties stipulate to the transfer and to an appropriate amendment of the complaint, . . . or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court." Under the administrative order, the circuit court could only transfer the case based on the Raabs' complaint, not on their motion response, the dissenting judge reasoned. The dissenting judge agreed that the proofs attached to the motion and response did not appear to provide a basis for economic damages over $25,000. But, the judge observed, the complaint had requested non-economic damages, which cannot be proved in a precise dollar amount and are left to a jury to decide. The dissenting judge concluded that this was not a case in which transfer to the district court could be made pursuant to AO 1998-1. The Raabs appeal.

IN RE MASON, MINORS (case no. 139795)
Attorney for petitioner Michigan Department of Human Services: Jurij D. Fedorak/(586) 469-5350
Attorney for respondent Richard Mason: John J. Bologna/(248) 361-7923
Attorney for Guardian Ad Litem: Eric O. Lundquist, Jr./(810) 560-1169
Trial Court: Macomb County Circuit Court Juvenile Division
At issue: While the respondent-father was incarcerated, his two children were removed from their biological mother's home on a Child Protective Services petition; eventually, the family court terminated both parents' parental rights. The Court of Appeals affirmed the family court's ruling; shortly after the Court of Appeals ruled, the respondent-father was released from prison. Under the circumstances of this case, did the trial court clearly err in terminating the respondent-father's parental rights?
Background: Richard Mason and Clarissa Smith are the biological parents of two young children. In 2007, Child Protective Services filed a petition against both Mason and Smith, seeking removal of the children. A referee held a preliminary hearing on the petition in June 2007; Mason, who was incarcerated at the time, was represented by counsel at that hearing. The referee authorized the petition; the children were removed from Smith's custody and placed in foster care. At a July 2007 adjudication hearing, Mason appeared by speakerphone from jail; both he and Smith entered no contest pleas to the allegations in the petition. The children were eventually placed with Mason's relatives. Several additional hearings were held from August 2007 to May 2008. Mason's counsel was present at these hearings, but Mason was not. Mason's counsel informed the court that he had not spoken with his client and that he did not have information about any rehabilitative programs that his client might be involved in while incarcerated. According to the children's paternal aunt, Mason was sending letters to the children from prison. At a permanency planning hearing in July 2008, Mason's counsel told the court that his client wrote him and stated that he was extremely concerned with what was going on in his case, that he wanted what was best for his children and to be part of their lives. Mason also told his counsel that he wanted to be part of all court proceedings. Mason's counsel explained that

Mason had provided his phone number, and that he thought he had arranged to have Mason on speakerphone for that hearing, but "apparently not." Counsel stated that he would make such arrangements for future hearings. On December 3, 2008, the Department of Human Services filed a supplemental petition seeking the termination of both parents' rights. Mason appeared by speakerphone at a permanency planning hearing that day. A foster care worker reported that he had received documentation from Mason that he completed a business education technology course while in jail, that he was attending weekly Alcoholics Anonymous meetings, and that he was awaiting an opening in a parenting class. The foster care worker stated that the Department of Human Services was recommending termination of parental rights of both parents because the children had been in care for 18 months and "[w]e're not any closer today to being able to return to a safe and stable home than we were when the boys first came into care." A termination trial was held on February 3, 2009. Mason was present on a writ from prison; Smith did not appear. Mason's counsel requested an adjournment, noting that Mason, upon his expected release from prison in July 2009, would be "ready, willing, and able to take care of [the children] and support them in just a few months time." Counsel further noted that Mason had a job lined up and a suitable place to live. The referee denied the motion to adjourn. At the trial, the foster care worker summarized Mason's criminal history, his incarceration throughout the proceedings, and his failure to comply with the parent-agency agreement, opining that it was in the best interest of the children to terminate Mason's parental rights. Mason testified that, during his incarceration, he completed classes in anger management and business education technology, and also attended AA meetings and other behavioral programs. He attempted to get into a fatherhood class, but there were no openings. He was also working at prison jobs. Mason testified that, when released, he would live with his mother and work for his brother in the construction business. He stated that he loved his children and wanted to be reunified with them after his release. The referee found that clear and convincing evidence had been presented to support termination of both Smith and Mason's parental rights. As to Mason, the referee found that he had not provided any care for his children in more than two years, that his incarceration prevented him from complying with the parent-agency agreement, and that there was no reasonable expectation that he would be able to comply with the parent-agency agreement within a reasonable period of time. The referee added that, even viewing Mason's situation in the best possible light, it was in the children's best interests that the parents' rights be terminated. A termination order, signed by the family court judge, was entered on February 5, 2009. On September 15, 2009, the Court of Appeals affirmed the termination of Mason's rights in an unpublished memorandum opinion. One week later, Mason was paroled. Mason appeals. He argues in part that the Department of Human Services failed to maintain contact with him throughout the proceedings and did not ensure his appearance at all court hearings, in violation of MCR 2.004. Mason also contends that DHS did not provide him with an opportunity to comply with a parent-agency agreement tailored to his circumstances (see *In re Rood*, 483 Mich 73 (2009)).

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